

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:)	
)	
DANIEL HATAWAY,)	
)	
Complainant,)	CHARGE NO: 2006SF2287
)	EEOC NO: 21BA61306
and)	ALS NO: S07-817
)	
THE BOARD OF TRUSTEES OF THE)	
UNIVERSITY OF ILLINOIS,)	
)	
Respondent.)	

RECOMMENDED ORDER AND DECISION

This matter comes to me on a motion to dismiss the instant case for want of prosecution. Complainant has filed a response, and Respondent has filed a reply. Accordingly, this matter is ready for a decision.

Contentions of the Parties

In its motion to dismiss, Respondent contends that dismissal of the instant case is warranted since Complainant has failed on two occasions to comply with Commission Orders requiring that it tender to Respondent responses to certain Supplemental Interrogatories, as well as a release so that Respondent could obtain a copy of Complainant's Social Security disability records. Complainant, however, insists that his Social Security disability records are not relevant in his disability discrimination claim before the Commission, and that a dismissal of his case is not warranted given the fact that he has substantially complied with all of Respondent's other discovery requests.

Findings of Fact

Based on the record in this matter, I make the following findings of fact:

1. On March 7, 2006, Complainant filed on his own behalf a Charge of Discrimination, alleging that he was the victim of disability discrimination when Respondent failed to hire him for the position of Purchasing Agent II.

2. On October 24, 2007, the Department of Human Rights filed a Complaint against Respondent on behalf of Complainant, alleging that he was the victim of disability discrimination when Respondent failed to hire Complainant for the position of Purchasing Agent II. The Complaint specifically alleged that at the time of the adverse act, Complainant had been medically released to return to work and could perform the essential functions of the job.

3. On January 9, 2008, an Order was entered, which established deadlines for serving discovery requests and directed the parties to participate in a future telephone conference call.

4. On April 10, 2010, a telephone conference call with the parties was conducted in which Complainant's counsel indicated that he still owed certain responses to Respondent's supplemental discovery requests (that were not yet due), and Respondent's counsel indicated that Respondent would be filing a dispositive motion.

5. At some point after the April 10, 2010 conference call, Complainant served Respondent with responses to Respondent's Supplemental Interrogatories. In one of the Supplemental Interrogatories, Complainant was asked to identify all documents related to his application for disability with the Social Security Administration. Complainant responded that all such documents in his possession had been tendered to Respondent.

6. On May 14, 2008, Respondent filed a motion to compel Complainant to respond more fully to three Supplemental Interrogatories. Respondent also filed a motion seeking an extension of time to file a dispositive motion. In the motion for an extension of time, counsel for Respondent stated that the extension was needed in order to obtain Complainant's release for the purpose of obtaining all materials relating to his application for Social Security disability benefits.

7. On May 29, 2008, an Order was entered, which granted Respondent's motion to compel and its motion for an extension of time to file dispositive motions, after observing that Complainant did not file an objection to either motion. With respect to the motion for an extension of time to file a dispositive motion, the Order noted that obtaining Social Security records could be a lengthy process and required Respondent to file a report by October 31, 2008 regarding the status of any receipt of Complainant's Social Security records.

8. On June 25, 2008, Respondent filed a motion to dismiss the instant case with prejudice due to Complainant's failure to respond to outstanding discovery requests and to comply with Commission Orders. In the motion, Respondent asserted that Complainant had failed to provide responses to the Supplemental Interrogatories as required by the May 29, 2008 Order. It also maintained that although it had asked Complainant on May 1, 2008 and on May 30, 2008 to provide a signed release of his Social Security records, Complainant had not provided the signed release as contemplated by the May 29, 2008 Order.

9. On July 17, 2008, Complainant filed a response to the motion to dismiss, asserting, among other things, that: (1) the underlying issue in this case concerns the legal question as to whether an employer's policy requiring an employee to obtain a full medical release without restrictions before being able to test for a civil service job violates the Americans With Disabilities Act; (2) Complainant had provided Respondent with a copy of his application for Social Security disability benefits; and (3) none of his Social Security disability records were relevant to the instant proceedings. Complainant alternatively requested a short additional time to provide the release for said records should there be a determination that his Social Security records were relevant in the instant proceeding.

10. On July 21, 2008, an Order was entered, which denied the motion to dismiss, but granted Complainant an extension of time to August 11, 2008 to serve Respondent with more complete responses to the Supplemental Interrogatories at issue in the May 29, 2008 Order, as well as a release for Complainant's Social Security disability records. The Order specifically

found that said records might have a bearing on issues contained in the instant case if Complainant had made any sworn statements during the Social Security proceedings that conflicted with his allegation that he could perform the essential duties of the Purchasing Agent II job.

11. On August 19, 2008, Respondent filed a second motion to dismiss, asserting that Complainant had not provided the additional discovery responses or the signed release for Social Security disability records as required by the July 21, 2008 Order.

12. On September 26, 2008, an Order was entered, which noted that Complainant had not filed a response to the second motion to dismiss and granted Complainant a short extension of time to October 6, 2008 in which to file a response to the second motion to dismiss.

13. On October 6, 2008, Complainant filed a response to the second motion to dismiss. In the response, Complainant's counsel claimed that the second motion to dismiss had been filed prior to a ruling on the first motion to dismiss and asserted that the second motion to dismiss was without merit since his responses to other discovery requests gave Respondent all of the records relevant to the instant dispute. Counsel for Complainant again asserted that the instant case should not be dismissed due to the existence of the Americans With Disabilities Act issue mentioned in Complainant's July 17, 2008 response to the first motion to dismiss and again requested an extension of time to provide a release for his Social Security disability records if there was a determination that Respondent was entitled to said records.

14. On October 9, 2008, Respondent filed a reply, arguing that dismissal of the instant case was warranted in light of Complainant's failure to comply with the July 21, 2008 Order that found Respondent was entitled to the responses to the Supplemental Interrogatories, as well as a release for the additional Social Security records.

15. On April 30, 2010, Respondent filed a status report indicating that Complainant had not provided the additional discovery as required by the May 29, 2010 and July 21, 2008

Orders and had not provided the signed release for Social Security disability records as required by the July 21, 2008 Order.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.
2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.
3. Under 56 Ill. Admin. Code, Ch. XI, Section 5300.720, a complaint may be dismissed when a party fails to substantially comply with any order concerning compliance with discovery, or otherwise engages in conduct which unreasonably delays or protracts proceedings.
4. An administrative law judge may issue a recommended order dismissing a case with prejudice as a sanction for the failure of a party to prosecute his or her case, file a required pleading, or otherwise comply with the terms of the Human Rights act, the rules of the Commission or a previous order. 775 ILCS 5/8A-102(I)(6).
5. Complainant has failed to substantially comply with prior orders of the Commission requiring that he serve responses to Supplemental Interrogatories and provide a release for his Social Security disability records.
6. Complainant has unreasonably delayed and protracted the proceedings in this matter.

Determination

The Complaint in this matter should be dismissed with prejudice due to Complainant's failure to either prosecute this action in a diligent manner or comply with Orders entered in this case requiring that Complainant serve Respondent with additional responses to Supplemental Interrogatories and tender a release for his Social Security disability records.

Discussion

Section 5300.750(e) of the Commission's Procedural Rules (56 Ill. Admin. Code, Ch. XI, §5300.750(e)) permits a recommendation of dismissal whenever a party engages in conduct that unreasonably delays the proceedings. In this regard, the Commission has previously found that a party's failure to provide discovery responses or abide by Commission orders directing responses to outstanding discovery requests can constitute unreasonable delay for purposes of issuing sanctions under section 5300.750(e). (See, for example, *Best and Allstate Insurance Co.*, IHRC, ALS No. S-11269, July 10, 2003, and *Crawford and Aramark Uniform Services, Inc.*, IHRC, ALS No. 9939, September 30, 1998.) Indeed, Illinois courts, in noting the importance of discovery obligations in civil litigation, have become less tolerant of violations of discovery orders, even at the expense of deciding a case on the basis of the sanction imposed, rather than on the merits of the litigation. See, for example, *Shapira v. Lutheran General Hospital*, 199 Ill.App.3d 479, 557 N.E.2d 351, 356, 145 Ill.Dec. 581, 586 (1st Dist., 2nd Div. 1990).

In the instant case, Respondent similarly argues that dismissal of the instant case is required because Complainant has failed to comply with two Commission Orders (i.e., May 29, 2008 and July 21, 2008), which specifically directed Complainant to provide more complete responses to certain Supplemental Interrogatories and failed to comply with the July 21, 2008 Order, which specifically required Complainant to supply Respondent with a release so that it could obtain copies of his Social Security disability records. In his response to the instant motion to dismiss, Complainant essentially states that Respondent has all of the records relevant to the instant dispute, and that dismissal is not warranted since he has tendered HIPPA releases from his medical treaters and has generally responded to numerous Interrogatories and Requests to Produce Documents. He also claims, as he did in his response to Respondent's first motion to dismiss, that dismissal is not warranted since: (1) the key issue in the instant case is whether Respondent's policy requiring that an employee on disability leave obtain a complete medical release without restrictions before being eligible to test for another

civil service job violates the Americans With Disabilities Act; and (2) the instant discovery disputes have no bearing on said issue.

Complainant's response to the instant motion to dismiss, however, does not persuade. Specifically, while Complainant claims that statements contained in his Social Security disability records are not relevant in the instant disability discrimination claim, I note that the Commission in *Buchman and States' Attorneys Appellate Prosecutor*, IHRC, ALS No. 04-022, October 17, 2007, found that a complainant's sworn statements in Social Security disability records is "highly relevant evidence" of a complainant's medical condition at the time said statements were made. (*Buchman*, slip op. at pg. 13.) In this regard, although Complainant has tendered his Social Security disability application, Complainant has effectively blocked Respondent from discovering whether he has made any other sworn statement in his Social Security disability records that could have called into question whether he could have performed the essential duties of the Purchasing Agent II position at issue in the instant case. As such, Complainant should not be allowed to filter potentially relevant evidence based only on his own notions of what constitutes relevant evidence.

True enough, Complainant has offered to tender the requisite release for his Social Security disability records in his most recent response to Respondent's second motion to dismiss. However, he made a similar offer in his response to the first motion to dismiss, when the issue regarding the relevancy Social Security disability records was addressed and resolved in Respondent's favor. Indeed, the July 21, 2008 Order specifically directed Complainant to serve Respondent with a release for his Social Security disability records after finding that Complainant's Social Security disability records might shed some light on his physical condition during the relevant time frames of the instant Complaint. Hence, Complainant's repeated offer to produce the subject release rings especially hollow under the instant circumstances where he had been expressly told in the July 21, 2008 Order to produce the release.

Additionally, Complainant's counsel appears to be confused about the existence of the July 21, 2008 Order since he (erroneously) states in his response to the second motion to dismiss that Respondent's first motion to dismiss was still pending at the time Respondent filed a second motion to dismiss. This alleged circumstance, though, does not help our Complainant since even if Complainant's counsel was initially confused about whether there had been a prior order directing his client to produce the subject release, Respondent clarified the issue in its reply to Complainant's response to the second motion to dismiss by noting the existence of the July 21, 2008 order, as well as its directives to produce the release and other responses to the Supplemental Interrogatories by August 11, 2008. Thus, if Complainant's counsel were truly confused about what his client was required to do, Complainant's counsel could have recognized his confusion and forthwith tendered the release and other required responses based upon the July 21, 2008 Order. However, as noted by Respondent's counsel, Complainant has done nothing as of the April 22, 2010 date of its status report to either verify the existence of the July 21, 2008 Order or tender either the release or the responses to the Supplemental Interrogatories. Accordingly, under these circumstances, I can only conclude that Complainant is simply not going to produce either the release or the required responses to the Supplemental Interrogatories.

As to the appropriate sanction. Respondent, in citing to cases in which the Complainant failed to tender any responses to discovery requests, contends that the only appropriate sanction would be the dismissal of the instant case. Complainant, though, rightly notes that the cases cited by Respondent (i.e., *Flournory and Little Red Wagon, Inc.*, IHRC, ALS No. S-11973, October 7, 2004, and *Best and Allstate Insurance Co.*, IHRC, ALS No. S-11269, February 26, 2003) are not directly on point since the complainant in those actions had not served the respondent with any responses to its discovery requests, and the instant record suggests that our Complainant had complied at least with Respondent's initial discovery requests. However, Complainant's partial compliance with Respondent's discovery requests was acknowledged in

the July 21, 2008 Order as a factor in the decision to deny Respondent's first motion to dismiss. In this respect, and regardless of his discovery compliance in the past, Complainant's continued refusal to tender the subject release has effectively caused a stalemate in the prosecution of the instant Complaint on a issue that may be outcome determinative as to whether Complainant could ever establish as an element of his *prima facie* case of disability discrimination whether he could have performed the essential duties of the Purchasing Agent II position.

Thus, under these circumstances, I find that a dismissal the instant case is the only appropriate sanction in light of Complainant's continued refusal to tender the release for his entire Social Security disability record. Complainant's refusal to submit more responsive answers to certain Supplemental Interrogatories only reinforces the notion that Complainant is apparently uninterested in complying with Commission directives. Complainant's counter-argument that dismissal is inappropriate because the instant case raises a legal question as to whether Respondent's policy that an employee on disability leave must have a complete medical release without restrictions before being eligible to test for a civil service job violates the Americans With Disabilities Act does not require a different result. Specifically, while Complainant has raised a potentially interesting issue under federal law, the Commission has jurisdiction only over claims filed under the Human Rights Act. Accordingly, it is questionable whether a dispute over whether an employer's policy violates the federal Americans With Disabilities Act has any relevancy in this instant action where the legal standards between the two legislative acts are substantively different. See, for example, *Courtney and Oak Forest Hospital*, IRHC, 4627R, August 12, 1996, and *Books and City of Normal, Normal Fire & Police Commission*, IHRC, ALS No. S-8915R, December 12, 2001.

More important, though, Respondent's alleged reliance on one of its policies to explain the action taken against Complainant does not even come into play in the instant case unless and until Complainant can establish as part of his *prima facie* case the fact that he could have performed the essential duties of the Purchasing Agent II job with or without an accommodation.

(See, *Harton v. City of Chicago Department of Public Works*, 301 Ill.App.3d 378, 703 N.E.2d 493, 234 Ill.Dec. 632 (1st Dist., 4th Div. 1998).) In this respect, Complainant's now adamant refusal to tender a release that might reveal highly relevant evidence with respect to his ability to perform the essential job functions of the Purchasing Agent II job effectively prevents the Commission from making a fully informed determination with respect to his *prima facie* case. As such, Complainant's conduct requires that the case be terminated at this juncture.

Recommendation

For all of the above reasons, I recommend that Respondent's motion to dismiss the instant case due to Complainant's failure to comply with Commission Orders be granted, and that the instant Complaint and the underlying Charge of Discrimination of Daniel Hataway be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 26TH DAY OF JULY, 2010